STATE OF MICHIGAN

COURT OF APPEALS

In re Estate of GRACE ELAINE REID.

AMY PIPER and SANDRA WILLIAMS,

Appellants,

v

DAVID A. DIMMERS, Personal Representative,

Appellee.

UNPUBLISHED
February 27, 2014

No. 311336
Barry Probate Court
LC No. 11-025842-DE

Before: WHITBECK, P.J., and HOEKSTRA and GLEICHER, JJ.

PER CURIAM.

Prior to Grace Reid's death, she gave a messy, seemingly incomplete, handwritten document to her friend Sandra Williams. Reid thereafter met with an attorney and discussed the terms of a will she wanted him to draft. Reid died without having the attorney finish the job. Sandra and Amy Piper (the will proponents), both of whom inherited under the handwritten document, presented it to the probate court. Reid's siblings, who inherited little to nothing under the document, contested it. The probate court ruled that Reid's handwritten document represented notes made in preparation of a will and that Reid lacked testamentary intent when she created it. We affirm.

I. BACKGROUND

After Reid was diagnosed with heart disease, she drafted a handwritten document beginning "Last Will & Testament" and purporting herself to be "of sound mind." Reid's primary asset was 80 acres of land located in Hastings, Michigan. The document instructed that the land be sold and the proceeds divided among numerous individuals. Reid listed the individuals' names and placed monetary amounts next to some and amounts of acreage next to others. Other names were listed and then crossed out. Reid had one sister and three half-siblings. She struck her sister Eva Williams' name from her list of heirs, but then reinserted it with "5A" written after. Reid omitted any reference to her half-siblings. She did name three individuals, however, to whom she did "not leave 1¢" because they owed her money. The document also included several inserted notes regarding the disposition of her clothes and care of her dogs. Reid then signed the document and dated it January 22, 2008.

Reid gave the document to Sandra and asked her to hold onto it until Reid's death. On May 8, 2011, Reid passed away. Reid's parents predeceased her, she was never married and she had no children. The will proponents presented the handwritten document as Reid's holographic will and petitioned to have it admitted to probate as Reid's last will and testament. Eva contested the admission of the document to probate. At a bench trial, the will proponents presented evidence that Reid had a poor relationship with her half-siblings and purposely left them out of her will. They also presented evidence that Reid met with attorney Ken Struble in September 2010, and gave him instructions to draft a will consistent with her handwritten document.

The probate court initially ruled that Reid's handwritten document met the basic requirements of a holographic will because it was signed, dated and labeled as a will. Yet, the court declined to admit the document:

> However, in—in looking at the document in it's [sic] entirety, looking at the back which cont—contains some additional notes, incomplete statements, some of the statements you can—if you spend some time you can decipher to some extent. Then there's a crossing out of different names. Who did that, I don't know. Different boxes and then crossing out within a box. Different lines written.
>
> What it looks like to me in considering all the evidence presented and considering Mr. Struble's testimony, I don't find this to be a Will. I find it to be a—some notes that somebody had put together to—to perhaps prepare a Will, but this does not—this doesn't meet the requirements of being a—a Will that the Court can then enforce or determine what a person's intent would be. So I am going to determine that the—that this is not a Will and it will not be admitted as a Will in this courtroom.

II. VALIDITY OF WILL

The will proponents challenge the probate court's failure to give Reid's holographic "will" testamentary effect. We review for clear error the findings of a probate court sitting without a jury. *In Bennett Estate*, 255 Mich App 545, 549; 662 NW2d 772 (2003). "A finding is clearly erroneous when a reviewing court is left with a definite and firm conviction that a mistake has been made, even if there is evidence to support the finding." *Id.*

"A written will is valid if executed in compliance with" MCL 700.2502 or MCL 700.2503. MCL 700.2506. Pursuant to MCL 700.2502(2), a will is a valid holographic will "if it is dated, and if the testator's signature and the document's material portions are in the testator's handwriting." Whether the writer had actual testamentary intent can be established or challenged by extrinsic evidence. MCL 700.2502(3); *In re Smith Estate*, 252 Mich App 120, 125; 651 NW2d 153 (2002). Similarly, under the common law, to constitute a valid will, a writing must have been designed to operate to dispose of the testator's property upon her death. *In re Henry's Estate*, 263 Mich 410, 418-419; 248 NW 853 (1933). And the testator must have had testamentary intent at the time the will was executed. *In re Cosgrove's Estate*, 290 Mich 258, 262-263; 287 NW 456 (1939). As a result, mere drafts of wills are inadmissible to probate.

Id. at 262. Ultimately, it is the burden of the will proponent to establish the decedent's testamentary intent by clear and convincing evidence. *Smith Estate*, 252 Mich App at 125.

Here, a review of Reid's handwritten document supports the probate court's finding that Reid intended it to be only a draft. The document consists of barely legible notes on two sides of a single sheet of personal stationary bedecked with birds, butterflies and a bible quote. It contains a list of names with some crossed out. Several of the purported devises are also crossed out and changed. The document includes several incomplete instructions and in some instances, it is unclear to whom the instructions are directed. In all, the document appears to be Reid's attempt to organize her thoughts and determine how to divide her estate.[1] Reid's 2010 visit to an attorney further confirms that her 2008 notes were not intended to be her final will and testament. Reid clearly spoke to Struble with the intent to shore up her wishes and make a true will. Unfortunately, Reid failed to follow through before her death.

The will proponents argue on appeal that the probate court improperly based its decision on a question asked to attorney Struble. Trial counsel asked Struble whether Reid mentioned having a prior will during their meeting. Counsel quickly withdrew the question and no answer was given. There simply is no record indication that the probate court considered this withdrawn question in rendering its judgment.

The proponents further argue that the probate court should have given the holographic document effect because there is no evidence that Reid ever revoked it. However, in order for a will to be revoked by the testator, a valid will must first exist. MCL 700.2507(1). And the probate court determined that the purported holographic will was not a valid will under MCL 700.2502 because Reid lacked testamentary intent.

III. ADMISSIBILITY OF DECEDENT'S WRITTEN STATEMENT

The will proponents also challenge the probate court's exclusion of a handwritten statement that allegedly explained Reid's estranged relationship with her siblings. The will proponents opined that the nature of this relationship was important to explain Reid's decision not to devise the 80-acre property to them despite that Reid alone had inherited the property from their parents. The proffered statement is also barely legible, but explains Reid's allegations that her siblings mentally, physically and sexually abused her. When the will proponents attempted to present Reid's statement into evidence, the will contestants objected that the document was hearsay. The will proponents contended that the statement was not hearsay because it was drafted in Reid's handwriting and therefore was an accurate reflection of her "feelings." The probate court sustained the objection on hearsay grounds.

[1] The will proponents misconstrue the court's ruling regarding Reid's testamentary intent as a misreading of MCL 700.2502. The court did not rule that Reid lacked testamentary intent because the document would be difficult to interpret. Rather, the court found the document's condition to be evidence that it represented only notes.

At trial, the will proponents argued that this statement did not constitute hearsay because it was in Reid's handwriting. The probate court found that it was hearsay and excluded the handwritten statement from evidence. On appeal, the will proponents now argue that the statement constituted admissible hearsay and should have been admitted into evidence pursuant to MCL 600.2166(3) (the dead man's statute) or that it met the catchall hearsay exception of MRE 803(24). We generally review a lower court's evidentiary rulings for an abuse of discretion. *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010). The will proponents' appellate challenge is not preserved, however, because they argued for the admission of the evidence on different grounds below. See *Klapp v United Ins Group Agency, Inc*, 259 Mich App 467, 475; 674 NW2d 736 (2003). This Court may decline to review issues raised for the first time on appeal in a civil case. *Nuculovic v Hill*, 287 Mich App 58, 63; 783 NW2d 124 (2010).

> This Court may overlook preservation requirements if the failure to consider the issue would result in manifest injustice, if consideration is necessary for a proper determination of the case, or if the issue involves a question of law and the facts necessary for its resolution have been presented. [*Id.*]

The will proponents' arguments supporting the admissibility of Reid's statement are legal questions that we can review despite the failure to object below.

Even if the will proponents had raised the dead man's statute below, it would not have supported admission of the proffered evidence. MCL 600.2166 applies in actions "by or against a person incapable of testifying." MCL 600.2166(1). A person is considered "incapable of testifying" if he or she is deceased. MCL 600.2166(2). Pursuant to MCL 600.2166(3), "all entries, memoranda, and declarations by the individual so incapable of testifying, relevant to the matter, as well as evidence of his acts and habits of dealing tending to disprove or show the improbability of the claims of the adverse party, may be received in evidence." This Court has repeatedly held that MCL 600.2166 was impliedly abrogated by the abolishment of GCR 1963, 608 and adoption of MRE 601, which concerns witness competency. *In re Backofen Estate*, 157 Mich App 795, 801; 404 NW2d 675 (1987); *Mason v Chesapeake & Ohio R Co*, 110 Mich App 76, 77; 312 NW2d 167 (1981); *Dahn v Sheets*, 104 Mich App 584, 588-589; 305 NW2d 547 (1981); *James v Dixon*, 95 Mich App 527, 531-532; 291 NW2d 106 (1980). Under the court rule, death is not a ground for finding a witness incompetent and the decedent's prior written statements are inadmissible hearsay despite a party's inability to present that witness. Accordingly, MCL 600.2166(3) would not have supported admission of Reid's prior written statement.

In the alternative, the will proponents argue that Reid's handwritten statement was an exception to the hearsay exclusion because it met the requirements of MRE 803(24). The will proponents quote the evidentiary rule in their appellate brief, but make no attempt to apply it to the proffered evidence. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority." *Houghton v Keller*, 256 Mich App

336, 339; 662 NW2d 854 (2003) (citations omitted). An appellant's failure to properly address the merits of his assertion constitutes abandonment of the issue. *Id.* We therefore decline to consider this issue.

We affirm.

/s/ William C. Whitbeck
/s/ Joel P. Hoekstra
/s/ Elizabeth L. Gleicher